IN THE SUPREME COURT OF IOWA

No. 16-0435

CITY OF CEDAR RAPIDS,

Plaintiff-Appellee,

v.

MARLA MARIE LEAF,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT
OF LINN COUNTY
NO. CRCISC214393
HON. PATRICK R. GRADY, JUDGE

FINAL REPLY BRIEF OF DEFENDANT-APPELLANT

James C. Larew AT0004543
LAREW LAW OFFICE
504 E. Bloomington Street
Iowa City, IA 52245
Telephone: 319.337.7079
E-mail:
james.larew@larewlawoffice.com

ATTORNEY FOR DEFENDANT-APPELLANT

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SUMMARY OF THE ARGUMENT

Plaintiff-Appellee City of Cedar Rapids ("City"), for the first time on appeal, argues that "[t]his case commenced as a municipal infraction filed by the City in small claims court on March 31, 2015." Proof Brief of Plaintiff-Appellee ("Appellee Brief"), p. 1. The City has never expressly argued that the Notice of Violation issued by Gatso USA, Inc. ("Gatso") did not initiate the City's case against Defendant-Appellant Marla Leaf ("Ms. Leaf"). In fact, as part of the "appeal" to Magistrate Marty Hagge in small claims, in support of its case against Ms. Leaf, the City presented documentary and testimonial evidence of the Notice of Violation issued to Ms. Leaf and the Administrative Hearing Order to enforce the City's ATE Ordinance. (App. 00017-00022). Following the issuance of the Administrative Hearing Officer's Order, Ms. Leaf was then told how to "appeal" that decision. (App. 00066-00067). And she did so.

Contrastingly, now, the City premises many of its arguments on the entirely new framework: that the Notice of Violation of Cedar Rapids Municipal Code section 61.138 ("Ordinance") does not constitute a municipal infraction until the City initiates the process in Small Claims Court. Appellee Brief, pp. 1, 7, 18, 19, 25, 26, 28, 34, 36, 37, 48, 53. This is an untenable position, made demonstrably false by a straightforward analysis of

unambiguous language in the Code of Iowa and the Cedar Rapids Code of Ordinances.

First, Iowa Code section 364.22 sets forth clear procedural requirements for any City attempting to enforce municipal infractions. Iowa Code § 364.22(6). Second, the City Code unambiguously states that a violation of an ordinance is a municipal infraction. Cedar Rapids ("C.R.") Mun. Code § 1.12 ("any violation of a city ordinance, city code . . . constitutes a municipal infraction"). Third, the City enacts Cedar Rapids Municipal Code section 61.138 ("Ordinance"), which Ms. Leaf is alleged to have violated. Finally, whether Ms. Leaf contests the violation of a city ordinance in front of an administrative hearing officer or, upon an appeal of an administrative Order to a magistrate judge, contesting the City's issuance of a civil penalty following an alleged violation of the Ordinance is a "municipal infraction."

Not only does the City's new argument defy the law, it does not appear to have been preserved in the way it is currently articulated. Without waiving said objection, it is even clearer that the City's lawyers may not, in effect, amend its Code of Ordinances in an appellate brief. Rather, clearly, the Ordinance's enforcement process began when Ms. Leaf, in February of 2015, was informed, through Gatso's issuance of a mailed Notice of Violation to her, that a vehicle owned by her had allegedly been operated at an unlawful speed. This commencement was then followed by an "Order" from an Administrative

Hearing Officer, based upon the "preponderance of evidence" obtained in the course of a telephonic hearing. The Hearing Officer's Order purported to have the power of enforcement of the City's Ordinance. But, here, on appeal, the City protests that the enforcement process "commenced" only in Small Claims Court.

As a procedural matter, Ms. Leaf inadvertently left out her description of the preservation of issues, as required by Iowa Rule of Appellate Procedure 6.903(g)(1), and as noted by the City (Appellee Brief, p. 7). While Ms. Leaf does not believe that preservation of these issues is seriously disputed, other than unjust enrichment, which she expressly therefore did not address in her opening Brief, Ms. Leaf will address the preservation of the six key issues raised on appeal in order. Ms. Leaf will then briefly respond to the City's arguments within each section.

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT THE CITY HAD PROVEN THE VIOLATION BY CLEAR, SATISFACTORY, AND CONVINCING EVIDENCE

A. Preservation of Error

Ms. Leaf argued both in small claims court and on appeal to the district court that the City failed to provide "clear, satisfactory and convincing evidence" that she had been speeding on February 5, 2015. Appellant's Brief to Iowa District Court ("D.C. Brief"), pp. 15-19; App. 00067, 00081-00082.

B. Ms. Leaf was Not Speeding and Hearsay Cannot be Used to Prove a key Element of the Case; the ATE System was Inaccurate

The City presents a variety of arguments with respect to the accuracy of the "Safety" (and sometimes "Speed") Cameras calibrated by Gatso. Appellee Brief, pp. 9-16. The City touts that the "Speed Camera also performs a self-test daily to ensure the system is operating properly." Appellee Brief, p. 10. A "self-test," however, is not what is required by Iowa law to ensure accuracy of the radar calculating vehicle owners' liability. Iowa Admin. Code § 761-144.6(4).

Next, the City alleges that Cedar Rapids Police Department Officer Asplund ("Officer Asplund") testified about calibration and other issues without any objection from Ms. Leaf. Appellee Brief, p. 10. This is untrue. At each moment the City attempted to enter into evidence documents through Officer Asplund that were drafted by Gatso regarding the calibration or maintenance of the ATE equipment, Ms. Leaf's counsel objected. App. 00059-00060, 00062-00063. This evidence was hearsay. The City then argues that small claims has relaxed standards of hearsay, citing *GE Money Bank v. Morales*, 773 N.W.2d 533, 539 (Iowa 2009). Appellee Brief, p. 13. The City ignores, however, that while rules of hearsay may be relaxed in certain instances, they cannot be for the main (and in this case, only disputed) element of the case. The case cited by the City indicates exactly that: "[t]o require a party to bring in additional witnesses to testify upon matters **not necessary for the resolution**

of the case would be contrary to the policies of speedy and economical justice in a small claims proceeding." *GE Money Bank*, 773 N.W.2d at 539 (emphasis added). The Iowa Supreme Court in *Morales* further cited Iowa Code section 631.11(4), which described the judge's function in small claims proceedings where the standard was a "preponderance of the evidence," which is undisputedly not the standard applicable to Ms. Leaf's case. *Id.* The *Morales* standard therefore clearly supports Ms. Leaf's position that only hearsay was presented to support the claim that Ms. Leaf was exceeding the speed limit on I-380.[1]

The City tries to avoid this by claiming an exception to hearsay: that the annual calibration and Statement of Technology documents drafted by Gatso were business records. Appellee Brief, p. 12. The City cannot benefit from an exception to the hearsay rule where it is attempting to produce Gatso documents, and not its own. Officer Asplund was not the custodian of these documents, and did not testify as to the process for producing or storing this information at Gatso. *See* Iowa R. Evid. 5.803(6) ("all as shown by the

[1] Presumably in an attempt to avoid this unfair self-fulfilling hearsay, Tennessee has amended its statute on ATE by disallowing the use of traffic camera "evidence" for right turn red-light violations where there is no sign marking the "No Turn on Red." *See Am. Traffic Solutions, Inc. v. City of Knoxville*, 2013 Tenn. App. LEXIS 686, *4 (Tenn. Ct. App. Oct. 18, 2013) (citing Tennessee Code Annotated § 55-8-198(i)).

testimony of the *custodian* or other qualified witness"); *see also* Appellee Brief, p. 12 ("calibrations are done on a regular basis as part of Gatso's business"). The City offered no evidence to support the proposition that it kept the calibration documents in the regular course of its business. *See Morales*, 773 N.W.2d at 538 (summarizing that a "business record is admissible if it can be shown it was made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity") (citation omitted). The calibration document was created almost a year prior to Ms. Leaf's trial, and the City does not keep it. In fact, the City noted that many of the documents sought by Ms. Leaf in her pre-trial subpoena were in Gatso's possession, and therefore the City could not readily comply. App. 00014. The City cannot now claim that it keeps these documents in the regular course of its business, or that Gatso's documents are entitled to the business records exception by the City.

In attempting to buttress the questionable accuracy of its ATE, the City responds to Ms. Leaf's argument regarding the "significant" effect of the angle of the radar by ignoring its own business judgment rule. The City's business judgment rule does not enforce the speed limit, but rather, considers a violation of the Ordinance only when 12 mph in excess of a posted speed limit. App. 00045-00046 (Officer Caldwell confirms that he checks that the vehicle is allegedly traveling more than 12 mph over the speed limit when reviewing a

Notice of Violation). Therefore, while Officer Asplund recognized that the angle of the radar would unlikely affect the speed reading by as much as 12 mph, Ms. Leaf was cited for going 13 mph over the speed limit. Appellee Brief, p. 15. That is only one mile per hour over the speed at which one is considered to have violated the Ordinance. In addition to accepted error rates for radars, any additional effect from the angle of it would therefore be significant. The amount of the fine would also be affected based on even a difference of one mph. *See* C.R. Mun. Code § 61.138(d) (showing the fine increasing from $50 to $75 based on difference between 10 and 11 mph over limit). In fact, even in describing calibration documents, Officer Asplund noted the radar being off by .3 mph without knowing anything about the angle. App. 00063. Officer Asplund believed the angle might be 45 feet down, or ahead, or 45 degrees. App. 00077-00078. There can be no guarantee of accuracy where neither the angle is verified or even model and number of the equipment being calibrated. App. 00077. The City cannot therefore meet its burden of proof and Ms. Leaf's Motion for a Directed Verdict (App. 00081) should have been granted.

II. THE DISTRICT COURT ERRED IN HOLDING THAT THE ORDINANCE DID NOT UNLAWFULLY GRANT JURISDICTION TO THE ADMINISTRATIVE BOARD OR HEARING OFFICER

A. Preservation of Error

Ms. Leaf argued in all courts below that that the Ordinance unlawfully granted jurisdiction to the Administrative Board or Hearing Officer and was preempted by Iowa law. App. 00111-00112; D.C. Brief, pp. 20-26.

B. The Ordinance is Irreconcilable with State and City Law

It is undisputed that the City enjoys home rule authority "to determine their local affairs" to the extent that it is "not inconsistent with the laws of the general assembly." Iowa CONT., art. III, § 38A; Appellee Brief, p. 17. Not only is the ATE Ordinance irreconcilable with State law, however, the City's latest arguments are also irreconcilable with its own law.

There can be no dispute that Iowa Code Section 364.22, defining the process for prosecuting municipal infractions, applies to the City. Under the City's own definitions, a violation of an ordinance is defined as a municipal infraction. *See* C.R. Mun. Code § 1.12 ("any violation of a city ordinance, city code, or any section, subsection, paragraph, subparagraph, or any other part thereof, constitutes a municipal infraction subject to all the penalties, and other relief provisions set forth in Section 364.22, Iowa Code."). Ms. Leaf was prosecuted for violating the City's Ordinance. C.R. Mun. Code § 61.138.

By directing vehicle owners such as Ms. Leaf to contest alleged violations of the Ordinance through the administrative hearing process, conducted by a person styled as an Administrative Hearing Officer, the City is openly violating the provisions of Section 364.22, because such a person is not a "magistrate, district judge, or district associate judge." Iowa Code § 364.22(6)(a). The Notice of Violation issued by Gatso and sent to every alleged violator makes it clear that if one wants to contest the citation, one must go to an administrative hearing. *See* Ex. 1, p.2; App 121. Cedar Rapids police officers may not require individuals to go through the administrative hearing process (Appellee Brief, p. 18, citing App. 00065-00066), but Gatso employees, unlawfully delegated police power, when called by vehicle owners using the telephone number provided to them in the Notice of Violation, do. App. 00133. In fact, despite testimony in court, the City's police officers have otherwise admitted that one has to go directly to the administrative hearing to contest a citation. *See Your Traffic Camera Questions Answered*, THE GAZETTE, March 31, 2014, *available at* http://www.thegazette.com/2010/06/16/live-chat-on-red-light-cameras-11-a-m-tuesday ("Lt. Jeff Hembera: When you receive a notice of violation in the mail, there are instructions for either paying the citation or appealing the citation. To appeal, you contact the company as stated on the notice, and you will be given a time to appear at the Police Station to meet with a Hearing Officer. If the Hearing Officer finds against you, you have

the final option of appealing to civil court."). The City's continued attempt to confuse vehicle owners, force them into these administrative proceedings, and then, in court pleadings, claim to the contrary, is disturbing, at best.

While not citing any authority, the City references the "City's home rule authority to provide administrative remedies" for "various municipal building, housing, zoning, fire and nuisance abatement codes." Appellee Brief, p. 18. Presumably, however, these remedies were not internally inconsistent with other municipal code provisions or directly irreconcilable with State law. For instance, a violation of the City's housing code can result in a prosecution "by the filing of a misdemeanor citation *or* a citation for municipal infraction." C.R. Mun. Code § 29.09-106.4 (emphasis added). The City also expressly adopted Iowa Code section 364.22 defining a municipal infraction as part of its zoning ordinance, and provided express remedies and penalties for violations thereof. C.R. Mun. Code §§ 32.08.080, 32.08.090. The allowance of alternative remedies was specifically set forth in those provisions. Here, the City now implies that it can distinguish between the "administrative option" and the "municipal infraction process." Appellee Brief, pp. 19-20. A municipal infraction, however, *is* a violation of the Ordinance governed by Iowa Code section 364.22: one cannot violate the Ordinance and be entitled to one remedy and then violate it again (without any additional act) and be entitled to a different remedy. Iowa Code section 364.22 applies to Gatso's issuance of the Notices of Violation. *Cf.*

Appellee Brief, p. 19 ("[a] city by ordinance *may* provide that a violation of an ordinance is a municipal infraction" (emphasis added by City)). The City has done just that. The City, in the definition provisions of its Municipal Code, *has provided* that a violation of its city code and ordinances is a *municipal infraction* (and that Iowa Code section 364.22, defining the appropriate process, governs). The City cannot skirt its own duties by arguing otherwise now.[2] The City's desperate attempt to change the rules of the game after it (or Gatso) has forced countless citizens to attend administrative hearings to defend against municipal infractions is indefensible.

The City's argument that the administrative hearing amounts to concurrent jurisdiction with the Iowa District Court is also misplaced. Appellee Brief, p. 19 (citing *Hughes v. City of Cedar Rapids*, 112 F. Supp. 3d 817, 849 (N.D. Iowa 2015) (pending appeal)). Even assuming that the City[3] had the ability to grant jurisdiction to a new entity, which Ms. Leaf disputes, the administrative

[2] This is also inconsistent with the District Court's holding that describes the "municipal infraction" Ms. Leaf committed on February 5, 2015. App. 00160. Clearly it was a municipal infraction on February 5, 2015, and not just when the City decided to file a lawsuit against Ms. Leaf as part of her right to "appeal."

[3] This is not a situation where the Iowa General Assembly has determined that a juvenile court has concurrent jurisdiction with the criminal court over younger offenders, as in *State v. Stueve*, 260 Iowa 1023, 1026 (Iowa 1967), referencing Iowa Code section 232.62. If the City had the power it exercises here, it could arguably create a separate City-based and entirely new civil court for juveniles, negating the entire purpose of the "unified trial court" system embraced by Iowa Code section 602.6101.

hearing process is not a "court" to which one could resort "indifferently." *See Mallory v. Paradise*, 173 N.W.2d 264, 267 (Iowa 1969) (defining concurrent jurisdiction as "that jurisdiction exercised by different courts, at the same time, over the same subject-matter . . . wherein litigants may . . . resort to either court indifferently") (citation omitted). No one could reasonably choose the administrative hearing process, one conducted by a hearing officer with no legal training, whose Orders can be overruled by the police officer, over a court of law, "indifferently."

In fact, the thrust of Ms. Leaf's procedural due process claim is that the administrative hearing is not a court and cannot be resorted to indifferently. Appellant's Proof Brief, pp. 30-39. At the administrative hearing, testimony and evidence, to the extent it can be offered, is not preserved (App. 00067-00068); the Hearing Officer, often a friend of a police officer, has no letters of appointment, is not a judge or attorney, and in fact, their decisions can be overridden by a police officers. App. 00072-00076.[4] By contrast, Iowa Code section 364.22(6) reads that civil citations "shall be tried before a magistrate or a district judge in the same manner as a small claim." This mandatory language

[4] This is not a process, for instance, which allows a Vehicle Owner to subpoena witnesses or to examine anyone that could testify. *Cf. Bevis v. City of New Orleans*, 686 F.3d 277, 279-280 (5th Cir. 2012) (describing the process before an administrative hearing officer in that case, and noting that a previous iteration of the ordinance involved there had been invalidated due to the contractor making an initial enforcement decision).

does not envision concurrent jurisdiction with a City-created administrative process. Allowing an administrative hearing officer to make these determinations is permitting a municipal infraction enforcement recourse that is irreconcilable with Iowa law. The existence and grant of jurisdiction to the administrative hearing board, as contained in the Ordinance, is therefore preempted by Iowa law.[5]

C. The Ordinance is Further Preempted by Iowa Administrative Code Section 761-144.6

Contrary to the City's contention, Ms. Leaf preserved this argument. App. 00006-00007, App. 00110.

The fact that the Iowa Administrative Code (the regulations promulgated by the IDOT) is not an act of the legislature does not negate its ability to preempt municipal law. *See Goodell v. Humboldt Cty.*, 575 N.W.2d 486, 506 (Iowa 1998) (reviewing the preemption of an ordinance by determining "whether it conflicts with a state statute or regulation"). The City's argument that IAC Section 761-144.6 cannot preempt the Ordinance because it was

[5] This is distinct from the situation in *Beerite Tire*, where the city could enact more stringent standards that were not inconsistent with the regulations imposed—and the policy behind them—by the State. *Cf. Beerite Tire Disposal/Recycling, Inc. v. City of Rhodes*, 646 N.W.2d 857, 859-860 (Iowa 2002) (noting the Iowa code section allowing stricter standards by local government, and holding that the City of Rhodes's ordinances only "further restrict the already-enforceable restrictions"). The terrible result in this instance, however, is that the City is applying less stringent standards to itself in order to impose liability on citizens.

passed by the IDOT is frivolous. Appellee Brief, p. 20-21. Regulations are given "the full force and effect of law." *Wallace v. Iowa State Bd. Of Educ.*, 770 N.W.2d 344, 348 (Iowa 2009).

The City next entreats that it has substantially complied with the law and should therefore be excused from any minor infractions. Appellee Brief, p. 21. Were such an argument possible, Ms. Leaf would proffer the same: she was actually complying with the speed limit, let alone substantially complying with it. App. 00027-00028, 00037-00038. Iowa law governing calibration requires that such processes be conducted at least quarterly by a local law enforcement officer. Iowa Admin. Code § 761-144.6(4). While the law admittedly does not define "calibration," the City's police officers did not dispute that the calibration in Ms. Leaf's case had taken place more than *seven months* prior to her being issued a citation for speeding. App. 00070-00072. If a statutory term is not defined, words are given "their ordinary and common meaning by considering the context within which they are used." *Doe v. Iowa Dep't of Human Servs.*, 786 N.W.2d 853, 858 (Iowa 2010). The ordinary meaning of the word "calibration" is the "act of calibrating," which in turn is defined as "to adjust or mark (something, such as a measuring device) so that it can be used in an accurate and exact way." MERRIAM-WEBSTER DICTIONARY, *available at* http://www.merriam-webster.com/dictionary/calibrating. Driving under an instrument (with no possibility to adjust it) is not calibrating it, contrary to the

City's claims. It is testing the accuracy in one manner, but no adjustments can be made by the Cedar Rapids Police Department to calibrate the radar even if it is not reading properly. The City's ATE scheme is preempted by Iowa Administrative Code section 761-144.6(4).

Moreover, the City clearly understands what the term "calibration" means and its distinction from other sorts of tests because it uses the terms differently: "ATE equipment is tested quarterly by the CRPD" (Appellee Brief, p. 21); "Gatso performing annual calibrations" and "ATE radars are calibrated . . . on an annual basis by Gatso" (Appellee Brief, pp. 11-12); "CRPD tests the Safety Cameras itself" (Appellee Brief, p. 11); App. 00063-00064 (CRPD "tests") and App. 00070-00072 (Gatso "calibration"). To argue that the City "substantially complied" with the calibration requirements of Iowa law is excruciating. The City also argues that there was no evidence in the record regarding its lack of compliance with the 1000-foot rule. Appellee's Brief, pp. 21-22. In addition to having evidence in the record through Exhibits A through C, which were submitted as part of Ms. Leaf's pre-trial Motion to Dismiss, Ms. Leaf's counsel clearly made a record of the 1000-foot rule and the City's violation of it at trial. App. 00008-00010. The City has also previously recognized that these Exhibits are clearly part of the record of this case. *See* Plaintiff-Appellee's Brief to the Iowa District Court, pp. 12-15. The City cannot

now pretend that the locations of its cameras are not violating the Iowa and therefore preempted by it.

III. THE CITY HAS UNCONSTITUTIONALLY DELEGATED POLICE POWER TO GATSO

A. Preservation of Error

Ms. Leaf has continuously argued that the City had unlawfully delegated police power to Gatso. App. 00110; D.C. Brief, pp. 26-30; App. 00011-00012.

B. Gatso Has Significant Discretion in Determining Whether to Forward a Citation to the Police

The City ignores the facts of this case and focuses instead on the face of the Ordinance, which provides that a police officer determines who has violated the city's traffic ordinances. Appellee's Brief, p. 23 (citing Mun. Code section 61.138(a)). Even in its Statement of the Facts, the City attempts to rewrite history by entirely ignoring Gatso's involvement of initially reviewing the Notices of Violation (i.e., violating the Ordinance) and sending them to the Cedar Rapids Police Department. Appellee Brief, p. 6. The City implies that there is almost no human involvement in this process, and that "digital images" are sent (seemingly automatically from infallible machines) directly with no discretion. Appellee Brief, p. 23. As Ms. Leaf has previously described, the "send or don't send to the police" (and correspondingly, "prosecute or don't prosecute") decisions made by Gatso employees are not administrative decisions with little judgment involved. Appellant's Brief, pp. 27-29. In fact,

Ms. Leaf is still not certain on what basis any of these decisions are made by Gatso. Gatso employees are also providing advice as to how to contest one's Notice of Violation over the telephone. App. 00133. The City has surrendered core governmental functions to a private for-profit vendor whose discretionary decisions are subject to a contingency fee contract. This is an unlawful delegation of police power. *Warren Cty. Bd. Of Health v. Warren Cty. Bd of Supervisors*, 654 N.W.2d 910, 913-914 (Iowa 2002).

These tortured semantic attempts of the City to get around express state laws—laws by which it should willingly abide—must be prevented.

IV. THE DISTRICT COURT ERRED IN HOLDING THAT THE ORDINANCE DID NOT VIOLATE IOWA'S DUE PROCESS CLAUSE

A. Preservation of Error

Ms. Leaf argued in Small Claims court and the Iowa District Court that her procedural and substantive due process rights had been violated. App. 00009-00010; D.C. Brief, pp. 30-47.

B. Procedural Due Process is Violated When the Statutorily-Required Process is not Followed

The City has admitted that "*once a municipal infraction is filed*, the Iowa Code requires that municipal infraction be tried before a magistrate or judge as a small claim. Iowa Code § 364.22(6)(a) (2015)." Appellee Brief, p. 25 (emphasis by City). As noted above, the City is further bound by the provisions

of its own Code, ones that define municipal infractions as "any violation of a city ordinance, city code . . . constitutes a municipal infraction subject to all the penalties, and other relief provisions set forth in Section 364.22, Iowa Code." C.R. Mun. Code § 1.12.

The "Notice of Violation," which alleges a violation of the City's Ordinance, is therefore *exactly* the same thing as a municipal infraction. *Cf.* Appellee Brief, p. 25 ("these items are not the same thing"). Iowa Code section 364.22(2) allowed that the City *may* designate a violation of its ordinance as a municipal infraction (Appellee Brief, p. 26), and the City Council did just that. The City's attorneys cannot, now, undo that legislative determination. There is no "citation" or "Notice of Violation" or "violation" or other device to cover the fact that violating the Ordinance is a municipal infraction. The City may have intended to try this argument from the beginning by describing the "Notice of Violation" and "Automated Traffic Citation" in the Ordinance, but it did not change the definition of a municipal infraction. Moreover, there is no distinction in the Ordinance for the different "violations" that might occur: e.g., the City has repeatedly noted, despite contrary threats in FAQ documents maintained by Gatso on its website, that in "no event will an Automated Traffic Citation be sent or reported to the Iowa Department of Transportation." C.R. Mun. Code § 61.138(c)(4). According to this new argument by the City, would Ms. Leaf be subject to reporting once the City

files a formal "municipal infraction" lawsuit against her, as opposed to the Automated Traffic Citation? This cannot be the case. An Automated Traffic Citation is a municipal infraction. The penalties are the same; the rights to due process, therefore, must also be the same. And again contrary to the City's argument (Appellee Brief, p. 28), the record is clear that Ms. Leaf was required to attend the administrative hearing process. App. 00029-00031; App. 00121.

C. The Administrative Hearing Process Must be Eliminated as Violative of Due Process and the City's Continued Enforcement of ATE on Interstate Highways Shocks the Conscience

The administrative hearing process does not provide due process. The City has previously argued that the administrative hearing process in addition to the "appeal" to the Small Claims Court and District Court resulted in "procedural due process in multiple respects." Plaintiff-Appellee City of Cedar Rapids' Brief to District Court, p. 6. The City now argues that "Ms. Leaf was served with *notice of the violation* at issue in this matter by way of the municipal infraction that was personally served upon her on April 7, 2015." Appellee Brief, p. 30 (emphasis added). But this entirely ignores the "Notice of Violation" served by Gatso via regular mail sometime in late February of 2015. Ordinary judicial process is exactly what Ms. Leaf wants, and exactly what she has been denied. *Cf.* Appellee Brief, p. 30 (citing *Lujan, et al. v. G & G Fire Sprinklers, Inc.*, 532 U.S. 189, 197 (2001)). Due process does not begin when the

City decides to formally file a "municipal infraction." It began when Gatso informed Ms. Leaf that she had violated the City's Ordinance. Forcing Ms. Leaf to attend the administrative hearing was a denial of her due process rights. When one contests the violation of an ordinance, the designated (court) process must begin.

The fact that the burden of proof imposed upon the City is lower in the "administrative hearing" (preponderance of evidence) than that imposed on the City by the Iowa Code to prosecute municipal infractions (clear, satisfactory, and convincing evidence) is also critical. *Cf.* Appellee Brief, p. 34 (Ms. Leaf "again fails to recognize that the Notice of Violation is not a municipal infraction and, therefore, Section 364.22 does not apply"). Section 364.22 expressly does apply to this action. C.R. Mun. Code § 1.12(b) ("Each officer authorized to enforce a city code or regulation shall follow the procedures set forth under Section 364.22, Iowa Code"). The City may assure citizens greater protections than what Iowa law minimally promises; it may not provide fewer protections. The City must be held to the same standards of evidence and proof when prosecuting any violation of its ordinances, at every turn.

It is extraordinary, now, for the City's attorneys to argue that a citizen could be funneled into a less protective arena merely because charging documents have been styled as a "Notice of Violation," and not as a municipal infraction. The penalty imposed by the City upon any vehicle owner found

liable via either the Notice of Violation/administrative hearing or the municipal infraction/small claims court route is the same, other than court costs. Iowa Code section 364.22 defines municipal infraction as a "civil penalty of not more than seven hundred fifty dollars for each violation." Iowa Code § 364.22(1). The administrative hearing officer imposes a civil penalty of $75.00. App. 00124. This new theory would also mistreat all of the citizens who paid the fine not knowing that they were apparently not being charged with a violation of an Ordinance. Would the system work if citizens were informed that they may in the future be cited with a municipal infraction but the Notice of Violation does not mean that they violated the Ordinance at all? Contrary to the City's assertions, one cannot argue that due process challenges are invalid "regardless of any defect in the administrative hearing process." Appellee Brief, p. 34. The administrative hearing process is the denial of due process.

Finally, given the City's own Code of Ordinances, its argument that "suggesting that the City should be required to file a municipal infraction against every vehicle owner whose vehicle is captured … violating Section 61.138 . . . is unreasonable" (Appellee Brief, p. 36) must be rejected. That is exactly what Ms. Leaf is arguing, and that is exactly what the City is required to do. C.R. Mun. Code § 1.12. The burden placed on the City is what is required (and therefore reasonable). If the City wants to attempt to proceed otherwise, it must change its own laws. In perhaps the most honest assessment of the ATE

system, the City admits that filing a municipal infraction against every vehicle owner would "impose an undue burden on those vehicle owners who do not wish to contest the violation but, rather, just want to pay it, because they would then get stuck paying the court costs involved in the municipal infraction as well as the civil fine if they were found liable." Appellee Brief, p. 36. That is the trick of the entire system. The Iowa Supreme Court recognized this argument from opponents of ATE eight years ago: "ATE ordinances . . . amounting to sophisticated speed traps designed to raise funds for cash-strapped municipalities by ensnaring unsuspecting car owners in a municipal bureaucracy under circumstances where most busy people find it preferable to shut up and pay rather than scream and fight." *City of Davenport v. Seymour*, 755 N.W.2d 533, 544 (Iowa 2008). The City is counting on those vehicle owners to "just pay it." This is what makes it really "no choice at all," *Williams v. Redflex*, 582 F.3d 617, 621 (6th Cir. 2009), and part of the incredible injustice of this system. While Ms. Leaf is of course cognizant and concerned with the resources of the Court (Appellee Brief, p. 36), the City cannot use that burden to justify this scheme. That is the burden that the City itself requires in adjudicating municipal infractions. If the burdens would be too great (and the financial benefits therefrom not counteract it), the system will rightfully fail. The administrative hearing process must be eliminated.

The City cites *Hughes* for support that DOT regulations are irrelevant to

the functioning of ATE. Appellee Brief, p. 37 (citing *Hughes,* 112 F. Supp. 3d at 846 (N.D. Iowa 2015)). Of course, *Hughes* was decided in federal court without the evidence of the DOT's Orders regarding the functioning of these camera systems before it on a Motion to Dismiss, and is currently pending appeal. The argument that the City could not meet even the rational basis test where the State (through the DOT) had found that no legitimate interest existed for the cameras on I-380 was not before the *Hughes* Court. Only after having reviewed the City's ostensible justification for the cameras did the DOT determine that they were not related to safety and therefore could not be installed at these locations on the interstate highway. The DOT, with jurisdiction over this interstate highway pursuant to Iowa Code section 306.4, has determined that the ATE systems at all four locations must be removed or moved. App. 00091-00108. Despite the City's pending litigation, an "agency rule is generally presumed valid unless the party challenging the rule proves 'a 'rational agency' could not conclude the rule was within its delegated authority.'" *Meredith Outdoor Adver., Inc. v. Iowa DOT*, 648 N.W.2d 109, 117-18 (Iowa 2002) (citations omitted). Until the City proves otherwise, the DOT's Rules are valid and should be accorded deference.

The City then tries to have it both ways: this case did not "commence" until March 31, 2015, when it filed its "municipal infraction," but then the DOT's Order filed on March 17, 2015 does not apply to that, because it does

not apply "retroactively." Appellee Brief, p. 38. And Ms. Leaf did not arrive at any due process until her small claims trial on May 26, 2015, which also occurred subsequent to the DOT's final order. The City's attempts to argue that these cameras/ATE have increased safety must fall on deaf ears. *Cf.* Appellee's Brief, pp. 43-44. The City has not proven that, or else the DOT would not have ordered their removal. The ATE scheme is unrelated to safety and irrational.[6] The City's continued use of the ATE system in this manner shocks the conscience and therefore violates substantive due process rights.

The City cites *City of Sioux City v. Jacobsma,* 862 N.W.2d 335 (Iowa 2015), for the proposition that the "right to travel is not impacted by automated traffic enforcement mechanisms." Appellee Brief, p. 42. *Jacobsma* did not involve any right to travel having been infringed and in fact defendant stipulated to the fact that he had been speeding. *Jacobsma*, 862 N.W.2d at 339. The DOT's Orders were also not before the Court. Most importantly, however, is that the right to drive along the interstate at the safe and consistent speed of traffic (and in fact, in Ms. Leaf's case, traveling *within* the speed limit and *more slowly than* the vehicles around her) without being subject to an irrational fine is a violation of her rights to interstate and intrastate travel. Similar to the protected property right in "not being subject to irrational monetary fines" (*Jacobsma*, 862 N.W.2d

[6] The City's speed trap can readily be likened to a tollbooth. It would certainly be irrational for the City to only impose a toll on cars driving on its roadways and not trucks, or only against cars with yellow license plates but not red.

at 345), Ms. Leaf asserts an interstate travel right to be free from irrational speed law enforcement that deters the use of a public highway.

V. EQUAL PROTECTION IS VIOLATED WHERE THE CLASSIFICATIONS MADE ARE NOT RELATED TO THE PURPOSE OF THE ORDINANCE

A. Preservation of Error

Ms. Leaf has consistently argued that her equal protection rights had been violated. App. 00112-00113; App. 00009-00010; D.C. Brief, pp. 48-51.

B. Iowa Law Requires Consideration of the Purpose of the Ordinance and the City Cannot Meet Rational Basis Under that Test

The City largely ignores key requirements of Iowa law in its description of the rational basis test under equal protection law. Appellee Brief, pp. 48-53. Iowa law is clear: the *purpose* of an Ordinance must be considered when its equal protection validity is challenged. *See Varnum v. Brien*, 763 N.W.2d 862, 882 (Iowa 2009) ("equal protection demands that laws treat alike all people who are 'similarly situated with respect to the legitimate purposes of the law.'"). The alleged purpose of the ATE Ordinance is safety; it has been unequivocally determined that the location of the ATE radar units at I-380 Southbound at J Avenue, the location from which Ms. Leaf received her Notice of Violation, is invalid based on that purpose. App. 00091-00108. Moreover, as Ms. Leaf argued in her opening Brief, there is no safety rationale to exempt semi-truck trailers and government vehicles from the Ordinance. The City provides not a

single argument as to how these classifications are consistent with, let alone rationally related to, with the purpose of safety. "Safety Cameras" would presumably take pictures of and record the speeds of trucks and any other vehicles (government or otherwise) traveling in excess of a lawfully-posted speed limit on the interstate highway. While a semi-truck trailer may not be owned by same person who owns the vehicle (Appellee Brief, p. 52), and, thereby, according to the City, should be exempted from prosecution under the ATE Ordinance, the same rationale could be said for arguing *against* the imposition of the City's irrebuttable presumption that the owners of vehicles are liable for an infraction even when they are not operating them. These distinctions are wholly irrational and no plausible explanation has been presented.

It is further irrational to provide out-of-state vehicle owners with a different process than in-state owners. The City cannot justify why the same logic it asserts for out-of-state vehicle owners does not apply to in-state: "[r]equiring out-of-state vehicle owners to travel to Iowa to contest their Automated Traffic Citation at an administrative hearing would not be reasonable, particularly in light of the relatively minor civil fine . . ." Appellee Brief, pp. 52-53. The same is true for in-state vehicle owners who have to travel hundreds of miles to where they might have been issued a citation. In fact, if one were from a number of regions in Illinois or Wisconsin and received a

Notice of Violation, driving distances to Cedar Rapids are closer than those from regions in Iowa. The Ordinance as implemented by the City and Gatso is constitutionally irrational and violates Ms. Leaf's equal protection rights.

VI. PRIVILEGES AND IMMUNITIES ARE VIOLATED BY THE ORDINANCE'S INFRINGEMENT UPON FUNDAMENTAL RIGHTS

A. Preservation of Error

Ms. Leaf has argued from the beginning that her privileges and immunities were violated. App. 00112; App. 00007-00008; D.C. Brief, pp. 29-32.

B. Vehicle Owners are Treated Differently Without any Rational Basis

Interstate travel is undisputedly a fundamental right. *Formaro v. Polk Cty.*, 773 N.W.2d 834, 839 (Iowa 2009) (citing *Saenz v. Roe*, 526 U.S. 489 (1999)). The City's arguments on fundamental rights must therefore focus on whether there has been an infringement on that right. Ms. Leaf asserts that the fundamental right to interstate travel encompasses the right to be free from irrational speed law enforcement proven by hearsay evidence on interstate highways is at issue in this case. The City cannot demonstrate that this Ordinance is narrowly tailored to a compelling state interest.

Moreover, for the same reasons as the Ordinance violates equal protection—that there is not even a rational basis to treat certain vehicle owners differently—the privileges and immunities clause is violated. The City

continues to circularly argue that Ms. Leaf can travel wherever she likes as long as she follows the speed limits. Appellee Brief, p. 55. Ms. Leaf, however, was following the speed limit and yet she received a Notice of Violation. Her rights to intrastate and interstate travel were therefore infringed. Moreover, the City is not enforcing the speed limit; it is ostensibly attempting to enforce a limit of 12 mph above 55 mph (the speed limit), or 67 mph. But, insofar as the City's fixed radar equipment used to prosecuted Ms. Leaf is not calibrated according to the minimal requirements of state law, and because the fixed angle of that equipment is not verified, it is impossible to know exactly what speed the City was enforcing. An electronic speed monitoring system that cannot be proven to be working properly when targeting motor vehicles is a speed trap. The functional problems of such a system are amplified when the system is *designed* to exempt categories of vehicle owners—owners of semi-trucks; government vehicles—for reasons having nothing to do with public safety. Ms. Leaf urges this Court to recognize the infringement of an interstate and intrastate right to travel and be treated the same as all Iowa citizens on the roads (without certain trucks or other vehicles being treated differently).

CONCLUSION

For one or more of the reasons stated herein and in Ms. Leaf's opening Brief, Ms. Leaf respectfully requests that the district court's decision be reversed on liability and the Ordinance be held invalid and unconstitutional.

Dated this 8th day of August, 2016.

CERTIFICATE OF COST

Ms. Leaf will not submit a Certificate of Cost given that the Final Briefs and Appendix are filed and served electronically.

Respectfully submitted,

LAREW LAW OFFICE

/s/ James C. Larew

James C. Larew AT0004543
504 East Bloomington Street
Iowa City, IA 52245
Telephone: 319-541-4240
Facsimile: 319-337-7082
Email: james.larew@larewlawoffice.com
ATTORNEY FOR MARLA MARIE LEAF
APPELLANT

CERTIFICATE OF FILING/SERVICE

I hereby certify that on August 8, 2016, I electronically filed the foregoing Final Reply Brief of Appellant with the Clerk of the Supreme Court by using the Iowa Electronic Document Management System which will send notice of electronic filing to the following. Pursuant to Rule 16.317(1)(a), this constitutes service of the document on the following for purposes of the Iowa Court Rules.

Patricia G. Kropf Assistant City Attorney City of Cedar Rapids, Iowa 101 First Street SE Cedar Rapids, Iowa 52401 Telephone: (319) 286-5024 Facsimile: (319) 286-5135 Email: T-Kropf@cedar-rapids.org ATTORNEY FOR CITY OF CEDAR RAPIDS, IOWA APPELLEE	

/s/ Dillon Carpenter
Dillon Carpenter

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because: this brief contains 6,964 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1). This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because: this brief has been prepared in a proportionally spaced typeface using Microsoft Word 1997-2004 in size 14 Garamond.

Dated this 8th day of August, 2016.

Respectfully submitted,

LAREW LAW OFFICE

/s/ James C. Larew

James C. Larew AT0004543
504 East Bloomington Street
Iowa City, IA 52245
Telephone: 319-541-4240
Facsimile: 319-337-7082
Email: james.larew@larewlawoffice.com
ATTORNEY FOR MARLA MARIE LEAF
APPELLANT